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Abu Hassan bin Hasbullah v Zukeri bin Ibrahim

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(W)-349–02 OF 2016
HAMID SULTAN, ABDUL KARIM AND ASMABI MOHAMAD JJCA
22 OCTOBER 2017

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Tort — Defamation — Libel — Publication of defamatory words in two emails — Whether trial judge addressed facts in totality and found words as highlighted in impugned emails were defamatory of plaintiff — Whether trial judge erred in applying principles set out by law in resolving issues — Defences — Justification — Whether defendant's reliance on defence of justification defective — Whether defendant particularised which part of impugned emails enjoyed protection of justification — Whether trial judge erred in law and fact in wrongly accepting defence of justification — Whether appellate intervention was necessary — Fair comment and qualified privilege — Whether trial judge erred in law and in fact in his finding that defence of fair comment and qualified privilege were available to defendant — Whether defences were defeated by malice — Damages — Whether plaintiff should be awarded compensatory, aggravated and exemplary damages

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At all material times Abu Hassan bin Hasbullah ('the plaintiff') was a senior lecturer and Dean of the Faculty of Creative Technology and Heritage ('the faculty') at the University Malaysia Kelantan ('UMK'), while Zukeri bin Ibrahim ('the defendant') was a lecturer on probation in the same faculty in UMK. The plaintiff claimed that the defendant had authored two offensive emails dated 29 October 2014 and 30 October 2014 respectively ('the impugned emails') and caused the same to be published via the defendant's UMK email address to all the academic staff and all administrators of the faculty. The plaintiff contended that the words in the impugned emails were defamatory of the plaintiff and were calculated to disparage the plaintiff. The plaintiff further claimed that the publication of these impugned emails, which was likely to be circulated and read by the recipients, was issued with malicious intent and had resulted in the plaintiff suffering distress and embarrassment and his personal reputation and that of his office being adversely affected. The plaintiff had demanded that the defendant withdraw and/or retract the two impugned emails, render an apology to the plaintiff and provide an undertaking that he would not repeat similar publication of defamatory statements concerning the plaintiff to the public at large. Subsequently, the plaintiff filed an action in defamation against the defendant. By way of this action the plaintiff sought, amongst others, injunctive relief, damages for defamation, interest and costs. In response, the defendant pleaded that the

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words cited as defamatory in the impugned emails were true and relied on the defence of justification. He also claimed that the impugned emails were 'fair comments' on matters of 'public interest' to UMK, the faculty and all its students. The defendant had also relied on the defence of 'qualified privilege' stating that the impugned emails were a proposal to resolve pending problems and to raise matters concerning the administration and management of the faculty. After a full trial, the trial judge accepted the defendant's defences and dismissed the plaintiff's claim with costs. Hence the present appeal by the plaintiff on the grounds that the trial judge had erred in wrongly accepting the defence of justification and qualified privilege raised by the defendant. The plaintiff submitted inter alia that the impugned emails were addressed to third parties who did not have an interest or duty to receive the same and that more importantly the impugned were neither true nor proven to be true.

Held, allowing the appeal with costs of RM20,000:

(1) It was recognised that appellate interference with the findings made by the trial court will only take place in cases where there has been insufficient judicial appreciation of the evidence. In the present case, despite the magnitude of the complaints made against the defendant as evidenced in the impugned emails, the trial judge had reduced the complaints to only two issues. Based on the grounds of judgment it was clear that the trial judge focused on the issue of plagiarism surrounding the plaintiff's reference to materials from a non-existent university known as University Manggis in his thesis, and on the unaccredited programmes offered by UMK. There was no mention of the rest of the over 200 defamatory statements as relied upon by the plaintiff in the impugned emails. Thus, in arriving at his determination, the trial judge had not addressed the facts in totality or made a finding if those words as highlighted in the impugned emails were defamatory of the plaintiff based on the plaintiff's pleaded case and the evidence of the witnesses before him (paras 29–33).

(2) A perusal of the records of appeal showed that despite the plethora of cases that he could have relied upon in resolving the issues raised by the plaintiff, the trial judge did not apply settled principles of law and did not address the three stages that ought to be satisfied before resolving whether there was defamation and whether the defences applied. In a defamation case, the trial judge had a duty to rule on the three essential ingredients of the tort of defamation before he proceeded to decide on the defences pleaded by the defendant in his defence. Firstly, the trial judge ought to determine if the impugned emails were capable of bearing the defamatory meaning as ascribed in the plaintiff's statement of claim. Secondly the trial judge ought to examine if the impugned emails referred to the plaintiff. Lastly the trial judge ought to have resolved if the impugned emails were published to a third person. The trial judge ought to have

evaluated the evidence before him and made a finding on each and every ingredient of the tort of defamation before going to the defences. However, the trial judge had not undertaken this task but proceeded to make a ruling that the defendant had successfully raised the defences of justification, qualified privilege and fair comment. If the trial judge was of the opinion the first element of the tort of defamation had not been proven, he ought to have dismissed the plaintiff's case as the plaintiff had failed to prove his case on the balance of probabilities and ought not to have made a finding that the defendant had successfully raised the defences as pleaded in his defence. As such, the trial judge erred in not applying the principles set out by the law in resolving the issues before him (paras 34–41 & 45).

(3) On the point of pleading, the plea of justification should be specific as to which parts of the statements were said to be the truth. However, in the present case, from the point of pleadings right to actual proof, the trial judge erred in law and fact by failing to hold that the defendant's defence was defective as the defendant had not identified or particularised which part of the impugned emails enjoyed protection of justification. The defendant could not rely on his honest belief that the statements were true (paras 55–56).

(4) As for the defendant's defence of fair comment, it was found that that as there was no finding of fact made with respect to the complaints of the defamatory meaning of the words in the impugned emails, the trial judge's finding that the complaints of the plaintiff were true in substance could not be correct. Further, the defendant had not complied with the provision of O 78 of the Rules of Court 2012 by his failure to give particulars stating which of the words complained of, that he alleged were statement of facts and matters he relied on in support of the allegation that the words were true. As such, it was not open to the defendant to raise the defence of fair comment and the trial judge erred in law and in fact in his finding that the defence of fair comment was available to the defendant (paras 58 & 63–65).

(5) In the present case, the impugned emails were sent by a person who did not have the legal duty and interest or a duty, legal or social or moral, to make it and the recipient of the impugned emails did not have a corresponding interest or duty to receive it. In addition, at the time the impugned emails were sent there was already in place a mechanism in UMK for matters such as this to be referred to. In the circumstances, the trial judge erred in holding that the defendant who was a lecturer on probation could rely on the defence of qualified privilege to send the impugned emails concerning his superior to various third parties without having to resort to the legal mechanism provided by UMK, which the defendant and his witnesses confirmed existed. Further, the trial judge

erred in not addressing this essential element of the tort of defamation, in that, whether the defences put forth by the defendant was defeated by malice (paras 68–71 & 73).

(6) Based on the submissions and evidence it was clear that on the balance of probabilities the words as highlighted in the impugned emails were capable of and were defamatory of the plaintiff. These words in their natural and ordinary meaning, meant or were understood to bear the meaning as ascribed by the plaintiff in the statement of claim and the highlighted words in the impugned emails, which referred to the plaintiff, were published to third parties. Further, on the balance of probabilities the defendant had not established any of the defences pleaded in his defence. In awarding damages any award should be sufficient to vindicate the gravity of the allegations against the plaintiff. Based on the facts of this case, the position of the plaintiff and the behaviour of the defendant, the plaintiff should be awarded compensatory, aggravated and exemplary damages of RM70,000 to vindicate the plaintiff to the public and console him for the wrong done to him by the defendant (paras 74 & 79–80).

[Bahasa Malaysia summary

Pada kesemua masa material Abu Hassan bin Hasbullah ('plaintif') adalah Ketua Pensyarah dan Dekan Fakulti Teknologi Kreatif dan Warisan di Universiti Malaysia Kelantan ('UMK'), manakala Zukeri bin Ibrahim ('defendan') adalah pensyarah dalam tempoh percubaan di fakulti yang sama di UMK. Plaintif mendakwa bahawa defendan telah mengolah dua emel kasar bertarikh 29 Oktober 2014 dan 30 Oktober 2014 masing-masing ('emel yang dipersoalkan') dan menyebabkannya dihantar melalui alamat emel defendan kepada semua kakitangan akademik dan semua pentadbir fakulti. Plaintif menghujahkan bahawa perkataan dalam emel yang dipersoalkan itu bersifat fitnah terhadap plaintif dan dianggap untuk memperkecilkan plaintif. Plaintif selanjutnya mendakwa bahawa penerbitan emel yang dipersoalkan itu, yang berkemungkinan diedarkan dan dibaca oleh penerima, dihantar dengan niat jahat dan telah mengakibatkan plaintif berasa amat sedih dan malu dan reputasi peribadinya dan juga di pejabat telah terjejas teruk. Plaintif menuntut bahawa defendan mengundurkan dan menarik balik kedua emel yang dipersoalkan itu, membuat satu permohonan maaf kepada plaintif dan membuat satu akujanji bahawa dia tidak akan mengulangi penerbitan kenyataan fitnah yang serupa berkaitan plaintif kepada orang awam secara umumnya. Berikutan itu, plaintif memfailkan satu tindakan fitnah terhadap defendan. Melalui tindakan ini plaintif memohon, antara lain, relief injunktif, ganti rugi untuk fitnah, faedah dan kos. Dalam menjawab, defendan memplidkan bahawa perkataan yang dikatakan sebagai fitnah dalam emel yang dipersoalkan itu adalah benar dan bersandar kepada pembelaan justifikasi. Dia juga mendakwa bahawa emel yang dipersoalkan adalah 'fair comment' atas

perkara 'public interest' terhadap UMK, fakulti dan semua siswa. Defendan juga bersandar kepada pembelaan perlindungan bersyarat menyatakan bahawa emel yang dipersoalkan adalah satu cadangan untuk menyelesaikan masalah sedia ada dan untuk membangkitkan perkara berkaitan pentadbiran dan pengurusan fakulti. Selepas perbicaraan penuh hakim perbicaraan menerima pembelaan defendan dan menolak tuntutan plaintif dengan kos. Maka tuntutan ini oleh plaintif atas alasan bahawa emel yang dipersoalkan dihantar kepada pihak ketiga yang tidak mempunyai kepentingan atau tanggungjawab untuk menerimanya dan yang lebih penting emel yang dipersoalkan adalah tidak benar dan tidak juga dibuktikan benar.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000:

(1) Adalah diiktiraf bahawa campur tangan rayuan dengan dapatan dibuat oleh mahkamah perbicaraan hanya akan mengambil tempat apabila terdapat kekurangan penilaian kehakiman terhadap keterangan. Dalam kes ini walaupun magnitud aduan dibuat terhadap defendan seperti keterangan dalam emel yang dipersoalkan, hakim perbicaraan telah mengurangkan aduan kepada hanya dua isu. Berdasarkan alasan penghakiman adalah jelas bahawa hakim perbicaraan hanya tertumpu kepada plagiarisme sekitar rujukan plaintif untuk bahan-bahan daripada sebuah universiti yang tidak wujud dikenali sebagai Universiti Manggis dalam tesis, dan mengenai program bertauliah yang ditawarkan oleh UMK. Tidak ada menyebut tentang lebih daripada 200 pernyataan fitnah seperti yang diguna pakai oleh plaintif dalam emel yang dipersoalkan. Maka, dalam membuat keputusannya, hakim perbicaraan tidak mempertimbangkan fakta secara keseluruhan atau membuat dapatan jika perkataan tersebut seperti yang ditekankan dalam emel yang dipersoalkan adalah fitnah terhadap plaintif berdasarkan kes diplidkan oleh plaintif dan keterangan disaksikan di hadapannya (lihat perenggan 29–33).

(2) Semakan ke atas rekod rayuan menunjukkan bahawa walaupun begitu banyak kes-kes yang dia boleh disandarkan dalam menyelesaikan isu-isu yang dibangkitkan oleh plaintif, hakim perbicaraan tidak menggunapakai prinsip undang-undang sedia ada dan tidak menangani tiga peringkat yang sepatutnya untuk dipenuhi sebelum menyelesaikan sama ada ada fitnah dan sama ada pembelaan terpakai. Dalam kes fitnah, hakim perbicaraan mempunyai kewajipan untuk membuat keputusan mengenai tiga perkara penting dalam tort fitnah sebelum dia meneruskan untuk membuat keputusan mengenai pembelaan diplidkan oleh defendan dalam pembelaannya. Pertama, hakim perbicaraan patut menentukan sama ada emel yang dipersoalkan mampu yang mempunyai maksud fitnah seperti mengatakan dalam penyata tuntutan plaintif. Kedua, hakim perbicaraan patut meneliti sama ada emel yang dipersoalkan merujuk kepada plaintif. Akhirnya hakim percubaan

A sepatutnya memutuskan jika emel yang dipersoalkan telah dihantarkan kepada orang ketiga. Hakim perbicaraan sepatutnya menilai keterangan di hadapannya dan membuat keputusan pada setiap elemen tort fitnah sebelum pembelaan. Walau bagaimanapun, hakim perbicaraan tidak menjalankan tugas ini tetapi kemudian membuat keputusan bahawa
B defendan berjaya membangkitkan pembelaan justifikasi, perlindungan bersyarat dan komen yang adil. Sekiranya hakim perbicaraan berpendapat elemen pertama tort fitnah belum dibuktikan, beliau sepatutnya menolak kes plaintif kerana plaintif telah gagal untuk membuktikan kesnya atas imbangan kebarangkalian dan tidak
C sepatutnya membuat dapatan bahawa defendan berjaya membangkitkan pembelaan seperti diplidkan dalam pembelaannya. Oleh itu, hakim perbicaraan terkhilaf dalam tidak mengguna pakai prinsip yang ditetapkan oleh undang-undang dalam menyelesaikan isu-isu yang di
D hadapannya (lihat perenggan 34–41 & 45).

(3) Semasa memplid, pli justifikasi sepatutnya spesifik terhadap bahagian mana penyataan adalah dikatakan benar. Walau bagaimanapun, dalam kes ini, daripada poin memplid hingga ke bukti sebenar, hakim perbicaraan terkhilaf dari segi undang-undang dan fakta kerana gagal
E untuk memutuskan bahawa pembelaan defendan adalah cacat kerana defendan tidak mengenalpasti atau memperincikan bahagian mana emel yang dipersoalkan mendapat perlindungan justifikasi. Defendan tidak boleh bergantung atas kepercayaan jujur bahawa kenyataan itu adalah benar (lihat perenggan 55–56).

F (4) Bagi pembelaan komen adil defendan, ia didapati bahawa memandangkan tiada dapatan fakta yang dibuat berkenaan dengan aduan makna fitnah perkataan dalam emel yang dipersoalkan, dapatan hakim perbicaraan bahawa aduan daripada plaintif adalah benar, adalah
G tidak betul. Selanjutnya, defendan tidak mematuhi peruntukan A 78 Kaedah-Kaedah Mahkamah 2012 kerana kegagalannya untuk memberikan butiran menyatakan perkataan yang mana yang diadukan, yang didakwanya adalah penyataan fakta dan perkara yang disandarkan untuk menyokong tuduhan bahawa kata-kata itu benar. Oleh itu, ia
H tidak terbuka kepada defendan untuk membangkitkan pembelaan komen yang adil dan hakim perbicaraan terkhilaf dari segi undang-undang dan fakta dalam dapatannya bahawa pembelaan komen yang adil boleh terpakai kepada defendan (lihat perenggan 58 & 63–65).

I (5) Dalam kes ini, emel yang dipersoalkan adalah dihantar oleh seseorang yang tidak mempunyai tanggungjawab undang-undang dan kepentingan atau satu tanggungjawab, secara undang-undang atau sosial atau moral, untuk membuatnya dan penerima emel yang dipersoalkan tidak mempunyai kepentingan atau tanggungjawab sepadan untuk menerimanya. Di samping itu, pada waktu emel yang dipersoalkan itu

dihantar sudah ada mekanisme di UMK untuk merujuk perkara-perkara seperti ini. Dalam keadaan ini, hakim perbicaraan terkhilaf dalam memutuskan bahawa defendan seorang pensyarah dalam tempoh percubaan boleh bersandar kepada pembelaan perlindungan bersyarat untuk menghantar emel yang dipersoalkan berkaitan atasannya kepada pelbagai pihak ketiga tanpa merujuk kepada mekanisme undang-undang yang diperuntukan oleh UMK, yang mana defendan dan saksi-saksinya sahkan wujud. Selanjutnya, hakim perbicaraan terkhilaf kerana tidak menangani elemen penting tort fitnah ini, di mana, sama ada pembelaan yang dikemukakan oleh defendan dipatahkan oleh niat jahat (lihat perenggan 68–71 & 73).

(6) Berdasarkan hujahan dan keterangan ia adalah jelas bahawa atas imbangan kebarangkalian perkataan yang ditekankan dalam emel yang dipersoalkan mampu dan memfitnah plaintif. Perkataan ini dalam maksud semula jadi dan biasa, bermaksud atau difahami untuk memberi makna seperti yang dinyatakan oleh plaintif dalam penyataan tuntutan dan perkataan yang ditekankan dalam emel yang dipersoalkan, yang merujuk kepada plaintif, telah diterbitkan kepada pihak ketiga. Selanjutnya, atas imbangan kebarangkalian defendan tidak membuktikan apa-apa pembelaan yang diplidkan dalam pembelaannya. Dalam mengawardkan ganti rugi apa-apa award hendaklah mencukupi untuk mempertahankan keseriusan dakwaan terhadap plaintif. Berdasarkan fakta kes ini, kedudukan plaintif dan tingkah laku defendan, plaintif hendaklah diberikan pampasan, ganti rugi teruk dan ganti rugi teladan sebanyak RM70,000 untuk mempertahankan plaintif kepada orang ramai dan sebagai sagu hati akan kesalahan yang dilakukan oleh defendan kepadanya (lihat perenggan 74 & 79–80).]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 822–2054.

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 597–835.

Cases referred to

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226; [1979] 1 LNS 1 (refd)

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)

Adam v Ward [1917] AC 307, HL (refd)

Ayob bin Saudi v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor [2013] 3 MLJ 534, HC (refd)
English v Emery Reimbold & Strick Ltd and other appeals [2002] EWCA Civ 605; [2002] 3 All ER 385, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal [2006] 3 MLJ 289; [2006] 2 CLJ 251, CA (refd)
Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor [2007] MLJU 894; [2008] 2 CLJ 814, HC (refd)
John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108, FC (refd)
Kian Lup Construction v Hong Kong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)
Lee Kuan Yew v JB Jayaretnam [1979] 1 MLJ 281 (refd)
Miles v Logan (1851) 1 Ky 80 (Civ) (refd)
R v Flower (1879) 44 JP 377 (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (folld)

Legislation referred to

Rules of Court 2012 O 78

Appeal from: Suit No 23NCVC-1–01 of 2015 (High Court, Kota Bharu)

Malik Imtiaz Sarwar (Renu Zechariah and Cheryl Kwan with him) (Rosley Zechariah) for the appellants.
Hisham bin Fauzi (Hisham Fauzi & Assoc) for the respondent.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal arising from the decision of the learned judge of the High Court at Kota Bharu dated 24 January 2016 which dismissed the appellant's claim for defamation with costs of RM10,000.

[2] After having perused the appeal records, the written submissions of the respective parties as well as hearing the oral arguments on the issues raised, we allowed the appeal with costs of RM20,000 herein and below. We also ordered damages in the sum of RM70,000 to the appellant.

[3] Our reasons for doing so now follow. A

[4] For ease of reference the parties will be referred to as they were described in the High Court.

BRIEF BACKGROUND FACTS B

[5] The plaintiff, Abu Hassan bin Hasbullah was at all material times a senior academician/lecturer and political analyst and also the Dean of the Faculty of Creative Technology and Heritage ('FTKW') at the University Malaysia Kelantan ('UMK'). The plaintiff was the superior of the defendant in FTKW. C

[6] The defendant, Zukeri bin Ibrahim was at all material times a lecturer on probation in FTKW. D

[7] The plaintiff had commenced an action against the defendant for the tort of defamation. The plaintiff claimed that the defendant had authored two offensive emails dated 29 October 2014 and 30 October 2014 respectively ('the impugned emails') (see pp 841–844, Part B of appeal record ('AR')) and caused the same to be published via the defendant's UMK email address ie zukeri@umk.edu.my to various groups of people namely: E

(a) all academic staff of FTWK at the email address of academic.ftkw@groups.umk.edu.my; F

(b) all administrators of FTKW at email address of admin.ftkw@groups.umk.edu.my; and

(c) the FTKW at email address at ftkw@groups.umk.edu.my.

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[8] The plaintiff contended that the words in the impugned emails as underlined, in their natural and ordinary meaning, were defamatory of the plaintiff and in their natural and ordinary meaning meant and were understood to mean as described in para 9 of the statement of claim (see pp 36–38 of Part A, Vol 1 of AR). H

[9] These impugned emails were calculated to disparage the plaintiff and were issued with malicious intent and published and circulated to the above-stated groups.

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[10] As a consequence of the publication of these impugned emails which was likely to be circulated and read by the recipients of the above-stated addresses, the plaintiff suffered distress and embarrassment and his personal reputation and that of his office have been adversely affected and had caused

him to be despised and injured and brought into public scandal, odium and contempt.

[11] Between 28 October 2014 to 31 October 2014, the defendant too had sent various text messages from his mobile phone to the plaintiff, inter alia threatening to have the plaintiff sent to jail and falsely accusing the plaintiff of cheating on his grading.

[12] The plaintiff had also come to know on 4 November 2014, a group of lecturers and students from his faculty had assembled and signed a memorandum demanding for his removal as the Dean of the FTKW.

[13] Subsequent to the said impugned emails and text messages, there had been a barrage of articles, news, reports, statements posted almost daily since 5 November 2014 on online news portal Suara TV stating that Suara TV had been informed by an individual who is a lecturer in UMK that the plaintiff had committed fraud, that a police report had been lodged against him in Bachok Police Station, Kelantan on 1 November 2014 and yet no steps were taken against the plaintiff.

[14] Vide the plaintiff's solicitors letter dated 20 November 2014, the plaintiff demanded the defendant to withdraw and/or retract the two impugned emails, render an apology to the plaintiff as well as to give an undertaking that he would not repeat similar publication of defamatory statements concerning the plaintiff to the public at large. The plaintiff had also demanded that the defendant ceases to cause any further threats and harassments to the plaintiff.

[15] The plaintiff then commenced this suit seeking for, amongst others, injunctive relief, damages for defamation, interest and costs.

[16] In response to the plaintiff's claim, the defendant pleaded the defence of justification. He also claimed that the impugned emails were 'fair comments' on matters of 'public interest' to UMK, FTKW and all its students. The defendant had also relied on the defence of 'qualified privilege' stating that the impugned emails were a proposal to resolve pending problems and to raise matters concerning the administration and management of FTKW. The impugned emails too were to highlight wrongdoings of the plaintiffs in FTKW specifically and UMK generally.

[17] The case proceeded by way of a full trial with three witnesses for the plaintiff and four witnesses for the defendant having testified. After perusing the respective submissions filed therein and having heard oral arguments of

both parties, the learned judge accepted the defendant's defences and dismissed plaintiff's claim with costs.

[18] Aggrieved by the said decision, the plaintiff then appealed to this court against the whole decision.

THE DECISION OF THE HIGH COURT

[19] The findings of the learned judge were as follows:

(a) the issue on plagiarism is successfully justified by the defendant as it was proved that the plaintiff's PHD thesis entitled 'Film As A Lens of Cultural Identity: A Critical Analysis on Malaysia Film' was copied exactly from the writing of Viola Shafiq from the book of 'Arab Cinema';

(b) although the plaintiff's thesis was not 100% copied, there were certain parts that were copied and the references and/or sources of which were not stated and/or quoted;

(c) the defendant was justified in making the remarks that the plaintiff had created on his own, a university known as 'University Manggis', in order to give the impression certain insertions or materials he fabricated and/or cooked up in his thesis were actually sourced from credible and influential academic references;

(d) the defendant was the Accreditation Officer at the Quality Management Centre of UMK and was responsible to review the courses in FTKW to determine whether those courses were in accordance with the requirement set by the Malaysian Accreditation Agency ('MQA');

(e) on the issue of courses offered without approval of MQA, the defendant has successfully raised the defence of fair comments and qualified privilege as the 'Laporan Audit Komprehensif FTKW' disclosed that eight programmes offered by the faculty were without MQA's approval. Those programs were offered without qualified lecturers in the specified areas. There were also issues pertaining to inadequacy of lecture halls and clashes with the schedule of classes, which eventually led to the scraping of those courses;

(f) the defendant was also justified in making remarks on other issues such as mismanagement of finance of FTKW and inaccuracy in reporting of meeting outcomes;

(g) the defamatory remarks were true, which were disclosed only upon the investigation conducted by the defendant personally;

(h) the defendant had raised the defence of qualified privilege since those issues involved academic staffs and the students of UMK and is part of

A the job function of the defendant as the Accreditation Officer at the Quality Management Centre of UMK; and

(i) the defendant had successfully raised the defence of fair comment and qualified privilege, and the reporting by the defendant was based on true facts and not tainted by bad faith.

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OUR DECISION

The law

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[20] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[21] In the course of that, we had sought guidance from the very often D quoted case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

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[22] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial F appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

G

[23] In the above case, the Federal Court had also stated, the court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation H of the evidence by the trial court and reverse the decision if it is wrong.

[24] At the end of the case, the trial judge has a duty to explain how the said court had come to its findings and /or how it appraised the evidence and issues which will determine the outcome of the case before it. In doing so the judge I need not explain or identify every factor that he had considered. If the learned judge failed to do so, his decision can be set aside (see *English v Emery Reimbold & Strick Ltd and other appeals* [2002] EWCA Civ 605; [2002] 3 All ER 385).

[25] The appellate court must be slow to interfere with the findings made by the trial court unless if it can be shown there was no judicial appreciation of the evidence adduced before it (see *Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal* [2006] 3 MLJ 289; [2006] 2 CLJ 251; *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87).

THE APPEAL BEFORE US

[26] We have fine-tooth combed the grounds of judgment ('GoJ') and found the following.

[27] The plaintiff's case against the defendant was premised on the tort of defamation. The plaintiff had pleaded that the defendant had caused to be published the impugned emails as in Appendix 1 and Appendix 2 attached to the plaintiff's statement of claim ('SOC') made on 29 October 2014 and 30 October 2014 respectively. In Appendix 1 there were 150 plus eight defamatory statements having been made (see pp 82–100 of Vol 1 of AR). Whilst in Appendix 2, another 155 plus eight defamatory statements were made (see pp 101–124 of Vol 1 of AR).

[28] According to the plaintiff the words underlined in the impugned emails, in their natural and ordinary meaning meant and were understood to mean the meanings as described by the plaintiff in para 9 of his SOC (see pp 61–62 of Vol 1 AR). These words according to the plaintiff, were calculated to disparage the plaintiff and were issued with malice intent and published and circulated.

[29] Despite the magnitude of the complaints made against the defendant as evidenced in the impugned emails, the learned judge had reduced the complaints to only two issues, the non-existence of 'University Manggis' which was quoted in the plaintiff's thesis and the unaccredited programmes offered by UMK. The rest of the complaints had been disregarded.

[30] The learned judge had also made a finding that there was plagiarism in the plaintiff's thesis despite the fact that the impugned emails made no reference to the complaint of plagiarism. The learned judge had even proceeded to make a finding that the defendant could rely on the defence of justification and qualified privilege when the complaints of the plaintiff in the impugned emails did not touch the topic of plagiarism.

[31] At para 20 of the GoJ, the learned judge stated as follows:

> Mahkamah bersetuju dengan hujahan pihak defendan bahawa *segala tulisan di dalam email beliau adalah benar dan bukannya fitnah berdasarkan penyiasatan beliau* ke atas apa yang dialami oleh pensyarah-pensyarah dan pelajar Universiti Malaysia

A Kelantan dan pembelaan oleh defendan adalah pembelaan justifikasi. Selanjutnya, mahkamah juga bersetuju dengan hujahan defendan bahawa keterangan defendan bahawa tulisan email itu telah dibuat berdasarkan dan merangkuni ulasan saksama mengenai Plaintiff sebagai Dekan yang mewakili Fakulti Teknologi Kreatif dan Warisan (FTKW) di Universiti Malaya Kelantan, pendidik, Ahli Majlis Professor
B Negara dan penganalisis politik yang terkenal. Plaintif sepatutnya sebagai seorang dekan, ahli akademik ataupun pensyarah kanan dan penganalisis politik yang terkenal harus mengetahui bahawa segala tindakannya diperhati oleh masyarakat awam. (Emphasis added.)

C **[32]** As can be seen from the above-quoted para 20 of the GoJ the learned judge made a finding that the words as underlined in the impugned emails were true. However, at paras 14–16 of the GoJ, the learned judge focused on the issue of plagiarism, at para 17, on the issue surrounding the plaintiff's reference to materials from a non-existent university known as University Manggis in his
D thesis and at para 18 on the non-accredited courses. There was no mention of the rest of the over 200 defamatory statements as underlined in the impugned emails.

E **[33]** We were of the view that in arriving at his determination, the learned judge did not address the *facts* in totality and/or make a finding if those underlined words were defamatory of the plaintiff based on the plaintiff's pleaded case and the evidence of the witnesses before him.

F **[34]** Upon our perusal of the records of appeal, we found that the learned judge did not apply settled principles of law and did not address the three stages that must be satisfied before resolving whether there is defamation and whether the defences apply.

G **[35]** Despite there is a plethora of cases to guide the learned judge on how to resolve the issues before His Lordship when faced with cases of this nature, the learned judge went on a frolic of his own and took a very simplistic approach to resolve the issues before him.

H **[36]** In a defamation case, the learned judge has a duty to rule on the three essential ingredients of the tort of defamation before he proceeds to decide on the defences pleaded by the defendant in his defence. Firstly, the learned judge ought to determine if the impugned emails were capable of bearing the defamatory meaning as ascribed in para 9 of the SOC. Secondly the learned
I judge ought to examine if the impugned emails referred to the plaintiff. Lastly the learned judge ought to have resolved if the impugned emails were published to a third person.

(See *Ayob bin Saudi v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321; *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b;

Kian Lup Construction v Hong Kong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2007] MLJU 894; [2008] 2 CLJ 814).

[37] We could not detect anywhere in the GoJ this task was undertaken by the learned judge in the case before His Lordship, especially with respect to whether the words as underlined in the impugned emails were capable of bearing the defamatory meaning as ascribed in para 9 of the SOC and whether there was publication. Despite a sum of 158 and 163 defamatory statements respectively having been made in the impugned emails, the learned judge had not made any ruling on these statements. The learned judge was selective and had ruled only on the three issues as highlighted above, one of which was not even the subject matter of the plaintiff's complaint in the SOC.

[38] We also observed the learned judge did not address the third ingredient of the tort of defamation, the publication of the impugned emails to a third party as required of him in resolving cases premised on the tort of defamation.

[39] We are of the view that in a case of this nature, the learned judge ought to have evaluated the evidence before His Lordship and make a finding on each and every ingredient of the tort of defamation before going to the defences. Our view is supported by the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 which states as follows:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural meaning impute to the plaintiff any dishonourable or discredible conduct or motives or a lack of integrity on his part? If the question invites affirmative response, then the words complained of are defamatory.

[40] At para 25 under 'Isu: adakah samada pernyataan tersebut telah disiarkan kepada pihak ketiga' the learned judge stated as follows:

> [25] Mahkamah mendapati adalah jelas daripada keterangan yang dikemukakan elemen yang pernyataan-pernyataan berkenaan telah dihantar dan disiarkan kepada pihak ketiga adalah tidak dipertikaikan oleh kedua-dua pihak. Di dalam kes ini, pernyataan-pernyataan melalui email tersebut telah dihantar kepada pihak ketiga yang lain sepertimana diplidkan di dalam pernyataan tuntutan plaintif. *Sama seperti isu kedua, perkara ini juga tidak diperhalusi dan dibincangkan secara terperinci di dalam penghakiman ini memandangkan elemen pertama telah gagal dibuktikan oleh pihak plaintif.* (Emphasis added.)

[41] From the above paragraph, it would appear that the learned judge was not satisfied that the plaintiff had proven the first ingredient of the tort of defamation. However, upon perusal of the GoJ, we found that the learned

judge proceeded to make a ruling that the defendant had successfully raised the defences of justification, qualified privilege and fair comment. If the learned judge was of the opinion the first element of the tort of defamation had not been proven, the learned judge ought to have dismissed the plaintiff's case as the plaintiff had failed to prove his case on the balance of probabilities and ought not to have made a finding that the defendant had successfully raised the defences as pleaded in his defence. The learned judge seemed to be confused on the manner the case before him ought to be resolved. Further, how could the learned judge say 'Sama seperti isu kedua, perkara ini juga tidak diperhalusi dan dibincangkan secara terperinci di dalam penghakiman ini memandangkan elemen pertama telah gagal dibuktikan oleh pihak plaintif'. when the learned judge did not decide if the 158 and 163 underlined words respectively in the impugned emails, with the exception of the two we mentioned above, were defamatory of the plaintiff and were calculated to expose the plaintiff to hatred, ridicule or contempt in the minds of reasonable man or whether these words tend to lower the plaintiff in the estimation of right thinking members of society generally.

[42] The learned judge erred in deciding in the manner he did, as the plaintiff need not prove that the defamatory words were false in order to prove his case as the law presumes that the defamatory words were false (see *Miles v Logan* (1851) 1 Ky 80 (Civ); *Abdul Rahman Talib v Seenivasagam & Anor*).

[43] The plaintiff only needs to prove the publication of the impugned emails. 'It is not part of the plaintiff's case in an action of defamation to prove that the defamatory words are false for the law presumes this in his favour' (*Abdul Rahman Talib v Seenivasagam & Anor*).

[44] In *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2007] MLJU 894; [2008] 2 CLJ 814 the court provided the guidelines on how a defamation case ought to be resolved:

(a) the seriousness of the allegation made against the plaintiff;

(b) the nature of the information;

(c) the source of the information, eg some information have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;

(d) the steps taken by the respondent to verify the information;

(e) the status of the information;

(f) the urgency of the matter;

(g) whether comment was sought from the plaintiff;

(h) whether the article contained the gist of the plaintiff's side of the story;

(i) the tone and theme of the offending words; and

(j) the circumstances of the publication including the timing.

[45] On our perusal of the GoJ, we observed that the learned judge failed to follow the settled principles of law and had not made any findings on the matters as discussed above. We were of the view, the learned judge erred in not applying the principles set out by the law in resolving the issues before him.

[46] Only upon having been satisfied that all the three ingredients of the tort of defamation having been established by the plaintiff, then the next step is for the learned judge to examine if the defendant could rely on the defences pleaded in the defence.

[47] The defendant pleaded that the words underlined in the impugned emails were true and relied on the defence of justification.

[48] At paras 42–44 of his defence, the defendant pleaded that the impugned emails were 'fair comments' on matters of 'public interest' communicated to members of UMK, FTKW as well as UMK's students.

[49] The defendant also relied on the defence of qualified privilege and alleged that the impugned emails were a proposal to resolve pending problems concerning the administration and management of FTKW and the alleged wrongdoings of the plaintiff in the said management.

DEFENCE OF JUSTIFICATION

[50] We will now examine if the defence of justification is available to the defendant. In *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* the court held as follows:

> In a defamation action, the defence of justification is complete defense if it succeeds. And the question of malice or bad faith does not arise. *But, in order to succeed in the defence of justification a Defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein.* And in order to justify such comment, it is necessary to show that the comments are correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail by reason only that the truth of every charge is not provided if the words proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges (see s 8 of the Defamation Act 1957 and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66). It is also to be noted the partial justification may be useful in the mitigation of damages. (Emphasis added.)

[51] In *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534, the court held:

> For the defence of justification, the defendants failed to provide that the articles published were true in substance and effect. In other words, *the defence of justification requires the defendants to prove the same to be true in substance or materially different from truth.* (Emphasis added.)

[52] The defendant argued that the impugned emails were true in fact and substance and the same were sent to persons who had the essential interest in receiving the same and that he has the right to send the same. We agree with the plaintiff that the defence of justification and qualified privilege was wrongly accepted by the learned judge due to the following reasons as highlighted by the plaintiff:

(a) the impugned emails were addressed to third parties who did not have an interest or duty to receive the same;

(b) the impugned emails were not true nor proven to be true;

(c) when the defendant wrote the two impugned emails he was a probationary lecturer and there was a clear avenue and/or procedure for complaints to be addressed on matters concerning FTKW. In fact, the defendant as well as his witnesses had confirmed under oath this fact. In view of the aforesaid, the defendant did not have the duty to send the impugned emails in the way he did;

(d) the impugned emails were written from the defendant's official UMK email address which has its own guidelines on the dos and the don'ts to its users on the use of that media. It was disclosed during trial by the defendant and his witnesses that the defendant did not adhere to UMK's own guidelines in sending the said impugned emails to the recipients of the three mentioned email addresses;

(e) the words underlined in the impugned emails were statement of facts that were not true and not verified to be true prior to the defendant having published the same; and

(f) the defendant raised issues of, inter alia, racism, corruption, committing illegal acts, ill-treating staffs, etc.

[53] As shown above, other than the two mentioned issues herein, the learned judge did not address the rest of the complaints in the impugned emails in his GoJ which form the bulk of the complaints. There was a sum of 155 plus 8 and 163 allegedly defamatory statements respectively having been identified in Appendix 1 and Appendix 2 which the learned judge had totally disregarded. Despite the magnitude of the complaints having been pleaded in the SOC, the learned judge chose to ignore these and proceeded to rule only on

two statements and another complaint which was not pleaded. Further there was no analysis of the evidence adduced before the learned judge with respect to the bulk of the complaints. If these complaints were true or otherwise it could not be ascertained as the learned judge had ignored these complaints completely. The learned judge erred in doing so as we have mentioned earlier, the learned judge did not make a finding if the bulk the complaints in the impugned emails were defamatory of the plaintiff.

[54] How could the learned judge make a finding that the impugned emails were true when he had only considered two of the 155 plus 8 and 163 complaints as underlined in Appendix 1 and Appendix 2 of the SOC and left out the bulk of the complaints as shown above. The learned judge fell into an error when he resolved that the defendant had successfully raised the defence of justification when there was no explanation afforded with regards to the bulk of the complaints.

[55] The defendant did not prove justification or the words as underlined in the impugned email were true. A defendant who relied on the defence of justification must substantially justify the statements by proving their precise truth and every defamatory fact as alleged. The defendant cannot rely on his honest believe that the statements were true.

[56] On the point of pleading, the plea of justification must be specific as to which parts of the statements were said to be the truth. We observed that from the point of pleadings right to actual proof, the learned judge erred in law and fact by failing to hold that the defendant's defence was defective as the defendant had not identified and/or particularised which part of the impugned emails enjoyed protection of justification.

(See *Abdul Rahman Talib v Seenivasagam & Anor*; *The law of Defamation in Singapore & Malaysia* by Keith R Evan (2nd Ed), Butterworth at pp 49–54).

FAIR COMMENTS

[57] We move on to the defendant's defence of fair comments. At para 20 of the GoJ, (see *para 33 above*) the learned judge stated that the defendant could rely on the defence of fair comment as all the complaints in the impugned emails were true and not defamatory based on the defendant's investigation and from the experience of the lecturers and students of UMK. The learned judge agreed that the defendant has successfully raised this defence as these were fair comments concerning the plaintiff who is the Dean of FTKW in UMK, an educationist, a member of *Majlis Professor Negara*, an academia, a senior lecturer and a well-known political analyst who ought to know that all his acts would be under the close scrutiny of the public at large.

[58] Based on the same argument as stated under the defence of justification, we found that as there was no finding of facts made with respect to other complaints in the impugned emails which contained about 150 plus 8 in Appendix 1 and 163 in Appendix 2, except for the two complaints discussed herein. Hence, the learned judge's finding that the complaints of the plaintiff were true in substance could not be correct. The learned judge ought to have considered if the defence of fair comment could be relied by the defendant and only after having found that the 150 plus 8 and 163 complaints were true in substance, then and only then the learned judge could decide if the defence of justification is available to the defendant. As the learned judge had failed to undertake this task, the rests of the complaints were not proved as true.

[59] Even for the two complaints with respect to reference to a non-existent university as in University Manggis and the unaccredited courses, which the learned judge found to have been proved, there was no evidence before the learned judge that these complaints were in fact true so as to afford the protection of the defence of justification to the defendant. With respect to University Manggis the evidence showed that the reference was not to University Manggis but a blog site known as 'Universiti.Manggis'. Whilst the matters concerning the unaccredited courses, the defendant was not the person responsible as the approvals of programmes and the decisions were made by the Chancellor, the Senate of UMK and the Ministry of Education.

[60] We were guided by the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd* which held as follows:

> For the defence of fair comment, in order to succeed the following basic elements must be established by the defendant, namely:
>
> 1. That the words complaint of are comments, though they may consist of or include inference of fact;
> 2. That the comments are on a matter of public interest; and
> 3. That the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved.

[61] *Gatley on Libel and Slander* (9th Ed), states as follows:

> To succeed in a defence of fair comment *the Defendant must show that the words are comment, and not a statement of fact. He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of.* (Emphasis added.)

[62] What is fair comment had been defined by *Gatley on Libel and Slander* (9th Ed) as follows:

> More accurately it has been said that the sense of comment is 'something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism,

remark, observation, etc'. Per Cussen J in *Clark v Norton* [1910] VLR 499.

[63] As the learned judge did not make a finding if the 150 plus 8 and 163 complaints in Appendix 1 and Appendix 2 were defamatory of the plaintiff how could the learned judge go on to say that the complaint were fair comment. Our scrutiny of the complaints stated in the impugned emails, showed that these were not comments as defined in the Gatley but statement of fact which could not be termed as comment for the purpose of the defence of fair comment. In *Lee Kuan Yew v JB Jayaretnam* [1979] 1 MLJ 281 the court held that 'a libelous statement of fact is not a comment or criticism of anything'. Therefore, based on the defendant's pleadings, it is not opened to the defendant to raise defence of fair comment concerning the public at large (see *R v Flower* (1879) 44 JP 377).

[64] On the point of pleading, we observed that the defendant had not complied with the provision of O 78 of the Rules of Court 2012. The defendant had failed to give particulars stating which of the words complained of, that he alleged were statement of facts and matters he relied on in support of the allegation that the words were true.

[65] Based on the foregoing, it is our humble view, the learned judge erred in law and in fact in his finding that the defence of fair comment was available to the defendant.

QUALIFIED PRIVILEGE

[66] The defendant had also relied on the defence of qualified privilege. In *Adam v Ward* [1917] AC 307 at p 334, Lord Atkinson stated as follows:

> A privilege occasion ... is an occasion where the person who makes a communication has an interest or a duty, legal or social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

[67] In *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108 it was held:

> Where a statement made by a person having legal duty to make it and the recipient has a corresponding interest or duty to receive it, such communication is privileged.

[68] Turning now to the case at hand, where the defendant pleaded that the impugned emails were sent to the persons who had an essential interest in receiving the same and that he had the right to send these impugned emails. We observed that the impugned emails were sent by a person who did not have the

A legal duty and interest or a duty, legal or social or moral, to make it and the recipient of the impugned emails did not have a corresponding interest or duty to receive it.

B **[69]** At the time the impugned emails were sent the defendant was only a probationary lecturer. At the material time, there is already in place a mechanism in UMK for matters such as this to be referred to. The defendant and his witnesses had confirmed this in their testimony in court. Therefore, the defendant did not have the legal duty and interest or a duty, legal or social or C moral to send the impugned emails to the three email addresses stated herein. Further, it was shown via evidence there was a set of procedure for sending emails on the UMK email address but this was not followed by the defendant. In fact, the defendant had breached the guidelines issued by UMK on the use of the email address. The defendant and his witnesses admitted that what the D defendant did was not in accordance with the guidelines issued by UMK.

[70] The impugned emails were statement of facts that were not true. The defendant pleaded that it was based on his personal investigation. Other than what was pleaded nothing more was shown and/or proved. Issues such as E racism, corruption, committing illegal acts and ill-treating staff were raised by the defendant against the plaintiff, however, no findings had been made by the learned judge with respect to the truth of the matter.

F **[71]** In view of the foregoing, the learned judge erred:

(a) in holding that, the defendant who was a lecturer on probation attached to FTKW, could rely on the defence of qualified privilege and caused the impugned emails to be sent and/or circulated to various third parties containing the defamatory statements concerning his superior who was G the Dean of FTKW without having to resort to the legal mechanism provided by UMK, which the defendant and his witnesses confirmed existed;

(b) despite the magnitude of the complaints and the defective pleadings, H due to lack of particulars with regards to the relevant part of the words as underlined in the impugned emails that were protected by the defences raised by the defendant as discussed above, the learned judge proceeded to rule that the defendant could rely on the defences as pleaded in his defence; and

I (c) with respect to reciprocity of the defendant to send and the recipient to receive the same, the learned judge failed to hold that the defendant did not have the legal duty and interest or a duty, legal or social or moral, to make it and the recipient of the impugned emails did not have a

corresponding interest or duty to receive as there was already a mechanism for making complaints about the plaintiff which was not followed by the defendant.

MALICE

[72] Malice is an essential element in an action premised on the tort of defamation. Malice in gist means making use of the occasion for improper purpose (see pp 84–88 of *The Law of Defamation in Singapore & Malaysia*). Malice if established would defeat the defence of fair comment and qualified privilege. The learned judge had failed to address this issue. In this case the plaintiff contended that there were eight instances of malice (elaborated in the plaintiff's written submission) which were not addressed by the learned judge as follows:

(a) the defendant had sent malicious and offensive text messages to the plaintiff. This was admitted by the defendant;

(b) the defendant had liaised with and forwarded the impugned emails to an online news blog known as Suara TV;

(c) the defendant had liaised and forwarded the impugned emails to a student blog post known as 'Pemudatekat.blogspot';

(d) the defendant had made a complaint to University of Vienna, the University the plaintiff pursued his doctorate;

(e) the defendant had posted numerous postings on Facebook and published the impugned emails;

(f) the defendant had lodged a police report against the plaintiff;

(g) the defendant continued to defame the plaintiff even after the legal notice was issued; and

(h) the defendant sent a letter to Duli Yang Maha Mulia Sultan of Kelantan without the approval of UMK and using UMK's letter head without the approval and the authority of UMK.

[73] We have perused the plaintiff's written submission under Heading '3rd Stage: DEFENCES DEFEATED BY MALICE' at pp 18–26 and fully agree that the learned judge failed to address this issue of malice and whether malice if proved would defeat the defence of fair comment and qualified privilege. Clearly the learned judge erred in not addressing this essential element of the tort of defamation, in that, whether the defences put forth by the defendant was defeated by malice.

LIABILITY

[74] Having perused the appeal records and heard the respective submissions, we hold and conclude, on the balance of probabilities the defendant in this action is liable to the plaintiff. We are satisfied that on the balance of probabilities the words as underlined in the impugned emails are capable of and are defamatory of the plaintiff. These words in their natural and ordinary meaning, meant or were understood to bear the meaning as ascribed by the plaintiff in para 9 of the SOC. We are satisfied, the words as underlined in the impugned emails which referred to the plaintiff were published to third parties. Further we are not satisfied the defendant has established on the balance of probabilities any of the defences pleaded in his defence.

DAMAGES

[75] In awarding damages for a claim founded on defamation we were guided by the established authorities enunciated by the higher courts. One of such cases which had been often quoted by the courts across the country is the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 where His Lordship Justice Sri Ram JCA had made reference to the book entitled '*Defamation Law, Procedure & Practice*' by Price and Doudu (3rd Ed) at p 208 which had laid down the principles to guide the court in assessing compensatory damages for defamation cases as follows:

(a) the gravity of the allegation;

(b) the size and influence of circulation;

(c) the effect of publication;

(d) the extent and nature of claimant's reputation;

(e) the behavior of the defendant; and

(f) the behavior of the claimant.

[76] The allegations against the plaintiff were very serious imputing to him, inter alia, criminal act, dishonesty, lack of credibility, greed and cheating. These allegations were highly libelous to the plaintiff. Any award to be awarded must be sufficient to vindicate the gravity of the allegations against the plaintiff.

[77] The plaintiff is a senior lecturer, an educationist, a member of *Majlis Professor Negara*, political analyst and the Dean of FTKW of UMK. Hence the plaintiff deserved an appropriate vindication and ought to be adequately compensated.

[78] The defendant had never expressed any regret and or remorse on the

alleged defamatory statements which had been published. Neither had the defendant apologised for the said publication.

[79] Perhaps it would be appropriate at this juncture for us to examine the pattern and or trend of damages awarded by the court in order to ascertain what would be a fair and suitable damages to be awarded to the plaintiff. In *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569 for instance where the defamation case involved a Cabinet Minister, the Court of Appeal saw it fit to reduce the award of damages of RM1.5m to only RM200,000. The court ruled that the award of RM1.5m awarded by the High Court was excessive. In *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226; [1979] 1 LNS 1 which case concerned a claim by an insurance supervisor of an insurance company against another agency supervisor, the award of damages of RM15,000 was reduced to RM9,000.

[80] The amount of damages to be awarded by the court in each case depends on the facts and the circumstances of the case. Looking at the facts of this case, the position of the plaintiff, the behavior of the defendant, we awarded compensatory, aggravated and exemplary damages of RM70,000 to the plaintiff. We are of the view that the damages awarded by the court is adequate to vindicate the plaintiff to the public and console him for the wrong done to him by the defendant.

CONCLUSION

[81] Having examined the pleadings, the notes of proceedings, and having heard the respective learned counsels, we found that the learned judge had not given sufficient judicial appreciation of the evidence both testimonial and documentaries as well as the established principles of law concerning the tort of defamation. We were constrained to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny it merits our appellate intervention. Hence, we unanimously allowed this appeal and set aside the order of the learned judge dated 24 January 2016 with cost of RM20,000 subject to payment of allocator fees. The deposit is refunded to the plaintiff.

[82] We therefore ordered accordingly.

Order accordingly.

Reported by Kohila Nesan